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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 847

HENRY C. HILL, WARDEN UNITED STATES NORTHEASTERN PENITENTIARY,

vs.

THE UNITED STATES EX REL. THOMAS M. WAMPLER.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THOMAS M. WAMPLER.

ROBERT E. LYNCH,
Counsel for Thomas M. Wampler.

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Opinions Below.

The opinion of the United States District Court for the District of Maryland denying a petition to amend the commitment of the appellee below (hereinafter called the defendant) is reported in 10 F. Supp. 609. The opinion of the United States District Court for the Middle District of Pennsylvania granting the defendant's discharge on habeas corpus is reported in 11 F. Supp. 540.

Jurisdiction.

The certificate of the Circuit Court of Appeals for the Third Circuit was filed in this Court March 19, 1936. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

The questions certified are the following:

1. Was the provision in the commitment for imprisonment for nonpayment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?

2. Was the determination of the District Court on the petition to correct the commitment, a final judgment conclusive on the issue as to the validity of such commitment until reversed by appropriate proceedings for review?

3. Will habeas corpus lie in one court to correct the commitment of another court which certainly, definitely, and specifically directs the imprisonment of relator for nonpayment of fine and costs on the ground that such provision was inserted by the Clerk, but was not the sentence orally pronounced by the Court?

Statements Involved.

The applicable statutes are set forth in the appellant's brief.

Statement.

The complete statement of facts are set forth in the appellant's brief.

Summary of Argument.

(1) The provisions in the commitment inserted by the Clerk of the Court that the defendant be imprisoned for nonpayment of fine and costs is void and contrary to R. S. 1041, U. S. C., Title 18, Section 569, and imprisonment for nonpayment of such fines and costs is illegal.

(2) The determination of the United States District Court for Maryland denying the petition to amend the commitment was not such a final order or judgment as to bar the appellee from securing a writ of habeas corpus to test the legality of his imprisonment.

(3) Habeas corpus will lie in one court to correct a commitment of another court which commitment does not conform to the sentence and judgment of the Court.

ARGUMENT.

(1)

The provisions in the commitment inserted by the Clerk of the Court providing for imprisonment for nonpayment of fines and costs is void as not consistent with the judgment of the Court.

The Court orally announced the sentence upon the appellee, defendant, and the judgment of the Court was recorded as follows: "Fine five thousand dollars and eighteen months in pentitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning this 28th day of December, 1933; fines to be cumulative and terms of imprisonment to run concurrently and that traverser pay costs of proceedings." The Clerk of the Court, however, in issuing the Commitment added the following: "And in default of payment of said fines and costs, he stand further committed until the payment of said fines

and costs or until discharged by due process of law." The contention of the appellee is that the judgment of the Court as recorded is controlling and the Clerk is without power or authority to change the judgment records of the Court and any attempt to do so renders that part of the judgment void.

R. S. 1041 (U. S. C.), Title 18, Section 569, provides in part "Where the *judgment directs* that the defendant shall be imprisoned until the fine or penalty imposed is paid * * *." Under this section the Court has discretionary power to require imprisonment upon the nonpayment of the fine or penalty but there may be cases supposed where the Court imposes imprisonment and fine that the Court does not wish further imprisonment upon the default of the payment of the fine. The defendant may have property from which the fine may be paid or the Government may execute upon the "judgment" the same as in civil cases. Incarceration is one form of punishment and the payment of a fine or penalty is another form and under R. S. 1041 it is submitted that the judgment must direct the imprisonment of the defendant upon the nonpayment of the fine or penalty, otherwise the Government is entitled to proceed only against the defendant's property.

Government's counsel in their brief at page 15 would interpret R. S. 1041 as providing that an accused should be imprisoned as a matter of course upon the nonpayment of a fine or penalty unless the Court should direct to the contrary. It is submitted that the language of R. S. 1041 discloses a different meaning when it states "Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid * * *." The Courts have so interpreted the Statute. There should not be imprisonment of a person by usage and custom.

The judgment as announced by the Court and the judgment as recorded by the Clerk did not provide that the de-

fendant stand further commitment in the event of a default in the payment of the fines. Admittedly the Clerk inserted this provision in the commitment. This question has been specifically passed on by the Federal courts.

In the case of *Boyd* v. *Archer*, 42 F. (2d) pages 43 and 44, the Court said:

> "* * * that the first judgment in the Washington District (entered February 27, 1928, in cause No. 11630) directed that he be imprisoned for fifteen months at McNeil's Island and 'pay a fine of $1,000.00,' without any provision for further imprisonment in case of default in the payment of the fine. Because of an appeal, commitment of this judgment did not issue until March 7, 1929, and appellant commenced serving the sentence of imprisonment on March 15, 1929.
>
> "Though, as already noted, this judgment contained no direction for further imprisonment on account of the fine, the clerk inserted in the commitment the clause, 'and that he (appellant) be further imprisoned at the same place until he shall have paid said fine or until he shall be discharged by law.' This insertion constitutes the basis of a minor contention which may be summarily disposed of by saying that under section 1041, Rev. St. U. S. (18 U. S. C. A. 569), *it is discretionary with the court to order or not to order a defendant imprisoned in case of his failure to pay a fine, that the court did not in this case direct such imprisonment, and that therefore the clerk having acted without authority in making the entry that part of the commitment is void.* See *Wagner* v. *United States* (C. C. A.), 3 F. (2d) 864. This view being conceded by appellee, further discussion is unnecessary." (Italics supplied.)

In *Wagner* v. *U. S.*, 3 F. (2d) page 864, the Court said:

> "Section 1041, Rev. Stats. (Comp. St. 1705) authorizes imprisonment until the fine or penalty imposed be paid, and under that statute it is discretionary with the court whether or not it will order the defendant into custody until the fine is paid."

In *ex parte Jackson*, 96 U. S. 727, the Court in the opinion, said:

> "The commitment of the petitioner to the county jail, until his fine was paid was within the discretion of the court under the statute."

The brief of the appellant, page 10, states "The provision in the commitment in the case at bar was inserted pursuant to a *rule* of *practice* of Court in order that the commitment might clearly express the legal effect of the sentence" and on page 14, same brief, states "The approved practice has been for the Judge orally to announce the amount of the fine and the term of imprisonment and for the clerk to make a docket entry reciting such term and fine with no reference in either to imprisonment for nonpayment of the fine." It must be conceded that there was no rule of Court as the word "rule" is understood. Rules of court are duly promulgated by the Court and published so that the bar and litigants may be informed of the same. Whether the practice was as outlined by the United States District Court for the District of Maryland in its opinion (10 F. Supp. 609) is of no moment for it cannot be controlling, for the simple reason that if the practice were not in accordance with law, then, irrespective of the length of that practice, it cannot gain validity merely by its age.

There is no need for reference to the procedure of the State courts in Maryland as the Federal Statute is clear. If such a "practice" as contended is permissable and legal then there is no reason why the Court should not say to the Clerk that where he pronounces a judgment upon a person convicted of an offense under an indictment containing more than one count, that the Clerk shall, in preparing the commitment, regard the terms of imprisonment under each count as cumulative and not to run concurrently. If the Court follows such a "practice" for five years and suddenly

drops dead, is his successor to continue such "practice"?

The only cases which have reached the Appellate Court have been decided in accordance with the contention of the appellee herein; *there are no decisions contrary to the decision of the lower court in this case.*

The judgment was recorded as pronounced by the Court. The judgment set forth in the commitment was neither pronounced by the Court nor recorded by the Clerk. *The commitment is contrary to and contradictory of the recorded judgment of a Court of record.* The appellee was confined by direction of a clerk in a commitment to imprisonment, not directed by any Court or any judgment to be found of record anywhere, but issued by the Clerk. The Court from the bench pronounced one judgment; it was recorded as pronounced. But the Clerk added a phrase to the judgment in the commitment which was not contained in or *recorded upon the judgment roll.*

The appellee's sole contention in this case is that there can be no such thing in law as a commitment differing from and contradictory of the recorded judgment upon which it is based. The validity of a commitment depends upon the validity of the judgment; the judgment is the authority for the existence of the commitment; the commitment can not go further than that upon which it depends for its very existence and validity. In the case at bar there is not to be found *in the judgment roll* any authorization for the insertion made by the Clerk in the commitment.

Appellee has not found an authority holding that a commitment differing from the *judgment as recorded is valid.* This case is not an attack upon the judgment, but an attack upon the commitment, *because it does not conform to the judgment as recorded upon the records of the Court.*

The statute above quoted makes it discretionary whether the Court shall direct commitment in default of the payment of a fine, and such is the construction and interpretation of

the statute by every Appellate Court before whom the question has been raised.

In this case there is nowhere to be found a judgment of record as described by the Clerk in the commitment.

The commitment in the case at bar does not conform to the recorded judgment, differs therefrom, is contrary to, and contradictory of the *recorded* judgment, and is for that reason invalid.

In the brief for appellant, it is sought to justify the legality of the commitment in this case by reason of a practice said to prevail in Maryland. Appellant seeks to support its position by reference to the case of *Haddox* v. *Richardson,* 168 Fed. 635, but scrutiny of the quoted part of the opinion discloses that the Court said:

> "It is a usual and ordinary course *for the Court* to commit the person required to pay the fine • • • that at the expiration of the term of imprisonment and in default of the payment of the fine or costs or the fine and costs, *according to the terms of the sentence.*"

With this decision appellee is in accord. The appellant loses sight of the fact that the commitment in this case is not drawn according to the terms of the *sentence and judgment of the Court.*

Appellant seeks to support its position by an opinion of the judge of the District Court of Maryland rendered upon a motion to correct the commitment.

In the opinion of the District Court of Maryland, the Court relies upon *Ex Parte Watkins,* 7 Peters 567.

There is no need for a Court to resort to the common law when there is in existence an applicable Federal Statute which has been construed and interpreted by Federal Appellate Courts. But an examination of the cases cited by the District Court of Maryland to sustain its position discloses the following thus:

In *ex parte Watkins, supra,* decided in 1829, the Supreme Court, *dealing with the early Maryland law, says:*

"Let us see, then, how the case stands upon the laws of Maryland, by which, indeed, it is to be governed. The Act of Maryland of the 20th of April, 1777 (ch. 6), which seems specially applicable to the recovery of pecuniary fines and forfeitures fixed by statute, declares that if such fines and forfeitures shall be recovered by indictment, the *Court* may either commit the offender to the public jail till the payment to the sheriff, or order execution to levy the same on the offender's lands, goods or chattels. * * * In another section of the act (Sec. 4), there is a proviso that nothing therein contained shall be construed to extend to prevent the several *courts,* as they might heretofore lawfully do, from committing any person for the non-payment of any fine, if they shall deem it expedient so to do. This proviso completely establishes the antecedent practice in Maryland to have been like that of the common law, to commit the offender for payment of the fine, *and leaves it at the discretion of the Court to order it in any future case. By necessary implication it affirms that without such order the offender is not detainable in jail for the fine.*"

"It has been said that where the party convicted is already in custody when the sentence is passed, the party is to be deemed in custody until the fine is paid, without any award of a commitment in the sentence, or the issuing of any capias ad satisfaciendum. We know of no authority justifying this position, whether at the common law or under the laws of Maryland. *On the contrary, the Act of Maryland of* 1777 (*ch.* 13) *plainly allows a discretion in the court to commit or not to commit for the fine. The omission to award a commitment, as a part of the sentence, is manifestly an exercise of such a discretion.*" (Italics supplied.)

In *ex parte Barclay,* 153 Fed. 669, relied upon by the appellant, the Court said:

> "The only penalty imposed for the offense is a fine of not more than $1,000 nor less than $50. No penalty of imprisonment is provided. The *sentence* imposed, or the order incorporated therewith, directed in the usual form that, in default of payment of the fine, Barclay should stand committed to jail until the fine should be paid or he should be otherwise discharged according to law. The *mittimus or warrant followed the sentence in this respect.* * * * Of course, it is conceded that a statutory implication may have the force of express phraseology."
>
> "In addition to the above, turning to sections 1041 and 1042 of the Revised Statutes, which are re-enactments of Act of June 1, 1872, c. 225, 17 Stat. 198 (U. S. Comp. St. 1901, p. 724), constituting the first statutory provision claimed by either party to bear on this topic, while it may well be claimed that the provisions of these two sections do not necessarily recognize the practice of the Federal courts in the particulars which we have stated, yet the fair construction of them is to the effect that they impliedly and fully confirm it." (Italics supplied.)

The opinion of the District Court in granting the writ of habeas corpus in the present case — *Wampler* v. *Hill,* 11 Fed Supp. 540, states as follows:

> "A prisoner is detained, not by virtue of the warrant of the commitment, but on account of the judgment and sentence. The commitment is predicated upon the judgment, and must be in substantial accord therewith. It cannot contradict the judgment. In Re Biddle, *Warden* v. *Shirley* (C. C. A.), 16 F. (2d) 566, 567, it was said: 'The mittimus after conviction in criminal cases is a final process for carrying into effect the judgment of the court. *Scott* v. *Spiegel,* 67 Conn. 349, 35 A. 262; *Taintor* v. *Taylor,* 36 Conn. 242, 4 Am. Rep. 58; *People* v. *Moore,* 3 Park. Cr. R.

(N. Y.) 465. The prisoner is detained, not by virtue of the warrant of commitment, but on account of the judgment and sentence. *Howard* v. *U. S.* (C. C. A. 6), 75 F. 986, 989, 34 L. R. A. 509; *People ex rel. Trainor* v. *Baker,* 89 N. Y. 460. The mittimus is predicated upon the judgment of conviction and must be in substantial accord therewith. *Ex parte Cloy,* 4 Porto Rico, 20; 16 C. J. Paragraph 3122, p. 1328. It, of course, cannot vary or contradict the judgment upon which it is based.'

The judgment clearly undertook to impose a fine, but it did not direct that the defendant be imprisoned until payment of the fine. No authority has been called to my attention, and after diligent search I have not been able to find one, which holds that a defendant shall be imprisoned in case of his failure to pay a fine where the court has not so ordered in the sentence.''

A sentence imposed on a defendant in his absence is void.

3 Whar. Cr. L. (7 Ed.) 300;
1 Bish New Cr. Pro. 1291;
Ball v. *U. S.,* 140 U. S. 118;
Lewis v. *U. S.,* 146 U. S. 370;
Hopt v. *Utah,* 110 U. S. 574;
Cooley Con. Lim. (5 Ed) p. 390.

A defendant must be present when sentence is imposed upon him.

Hopt v. *Utah,* 110 U. S. 574;
Lewis v. *U. S.,* 146 U. S. 370;
Ball v. *U. S.,* 140 U. S. 118.

ARGUMENT.

(2)

The determination of the United States District Court for Maryland denying the petition to amend the commitment was not such a final order or judgment as to bar the appellee from securing a writ of habeas corpus to test the legality of his imprisonment.

The petition filed by appellee was in the original criminal case and apparently was forwarded by mail by the appellee to the Court. However if the incarceration was not according to law, the accused is entitled to a writ of habeas corpus.

The Circuit Court of Appeals (Ninth Circuit) in the case of *Copeland* v. *Archer*, 50 F. (2d) 836, held that the defendant was entitled to a writ of habeas corpus where the judgment and sentence was void (therefore clearly appealable) even though no appeal was taken from the original conviction. The lower court refused to grant the writ, saying that appellant had had ample time to perfect a direct appeal, and that therefore the sentence was not open to collateral attack. The court in reversing the lower court said:

> "The fact that appellant had the recourse of direct appeal during the time that he was serving the admittedly legal sentence under count one does not prohibit his making application for a writ of habeas corpus at the present time. We are not concerned with his motives for delaying the plea, whether they arose from simple ignorance of his rights under counts two and three or merely the desire to wait until he felt that he might secure a summary writ which would secure his freedom.
>
> "When the writ is applied for, the court must consider if the prisoner is serving under a sentence beyond

the power of the court to impose; there is no question of punishment of the applicant because he chose a method of review in which it seemed to him the rights of the government were least protected. * * * To deny the writ of habeas corpus, in such a case, is a virtual suspension of it; and it should be constantly born in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source, equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. *In re Bonner,* 151 U. S. 242."

ARGUMENT.

(3)

Habeas corpus will lie in one court to correct a commitment of another court which commitment does not conform to the sentence and judgment of the court.

If the appellee was illegally detained and imprisoned by virtue of a void commitment, he is entitled to be released by habeas corpus, it is submitted, by the Court in the district wherein the appellee contends his illegal imprisonment occurred.

Under Argument No. 2, there is cited and quoted the case of *Copeland* v. *Archer,* 50 F. (2d) 836. That case specifically holds that one is entitled to a writ of habeas corpus where the imprisonment is illegal even though the question could have been determined by a direct appeal in the original case.

Conclusion.

Counsel respectfully submit the answer to the first question should be that the provision in the commitment for the imprisonment in default of payment of fines and costs was void; and the answer to the second question should be that the ruling of the District Court was not such a final

order as to prevent another court from issuing a writ of habeas corpus to determine the validity of the commitment; and the answer to the third question should be in the affirmative.

Respectfully submitted,

ROBERT E. LYNCH,
Counsel for Appellee.

April, 1936.

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